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In the Supreme Court of the United States

OCTOBER TERM, 1994

DEAN BORST, HARRY S. BACK, *ET AL.*,, AND THE CLASSES THEY HAVE BEEN CERTIFIED TO REPRESENT,
PETITIONERS,

v.

CHEVRON CORPORATION, CHEVRON U.S.A., INC., *ET AL.*,
RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit and the district court correctly held, in agreement with every other court of appeals to consider the issue, that petitioners' claim for disgorgement of "surplus" assets under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), should be decided by the court, and not a jury.

2. Whether the Fifth Circuit and the district court correctly held that the language of the pension plan and the summary plan descriptions was not in conflict and did not prohibit an amendment permitting the employer to recoup any residual assets attributable to employer contributions following the complete termination of the plan and the satisfaction of all liabilities to participants and their beneficiaries.

3. Whether the language of the pension plan required the distribution of "surplus" assets to a class of participants upon the partial termination of the plan.

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Much, "Pension Liabilities: Now You See 'Em, Now You Don't!," *Industry Week*, Nov. 16, 1981, at 72 16

Jereski, "The Surplus Vanishes," *Forbes*, Nov. 17, 1986, at 94 16

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No. 94-1464

DEAN BORST, HARRY S. BACK, *ET AL.*,, AND THE CLASSES THEY HAVE BEEN CERTIFIED TO REPRESENT,
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RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents Chevron Corporation, Chevron, U.S.A., Inc., Gulf Oil Corporation, Chevron Corporation Retirement Plan, Pension Plan of Gulf Oil Corporation, Benefits Committee of the Pension Plan of Gulf Oil Corporation and each of its members, and Pension Committee of the Pension Plan of Gulf Oil Corporation

and each of its members submit this brief in opposition to the petition for a writ of certiorari in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-36) is reported at 36 F.3d 1308. The district court's opinion (Pet. App. A-39 to A-183) is reported at 764 F. Supp. 1149. The order of the district court striking petitioners' demand for a jury trial (Pet. App. A-184 to A-185) is unreported.

JURISDICTION

The court of appeals entered its judgment on October 21, 1994, and denied petitioners' petition for rehearing on December 1, 1994. Petitioners filed their petition for a writ of certiorari on March 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners, former participants of the Pension Plan of Gulf Oil Corporation (the "Gulf Pension Plan" or the "Plan"), brought this case as a class action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), against Chevron Corporation ("Chevron"), Gulf Oil Corporation ("Gulf"), the Chevron Corporation Retirement Plan ("Chevron Plan"), the Gulf Pension Plan, and several affiliated entities. The dispute arose out of the merger of Chevron and Gulf in 1984, and the subsequent merger of the pension plans of the two companies in 1986.

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[1] In compliance with Rule 29.1, respondents state that they have no parent companies or non-wholly owned subsidiaries.

In a carefully-reasoned opinion the court of appeals unanimously affirmed the district court's judgment on each of the three issues presented by the petition: (1) whether participants seeking equitable relief under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), are entitled to a jury trial; (2) whether the language of summary plan descriptions of the Gulf Pension Plan prohibited the reversion of surplus assets to the employer following the satisfaction of all liabilities under the Plan; and (3) whether the terms of the Gulf Pension Plan required the payment of surplus assets to the participants upon a partial termination. Only the first of these issues involves a legal question of any general application, and this Court's review of that question is unnecessary because *every* court of appeals to consider it has agreed that participants are *not* entitled to jury trials. The remaining two issues are completely fact-bound, and dependent on the particular pension plan documents here involved. The district court and the court of appeals reviewed these documents with painstaking care and correctly decided those issues.

1. In 1975, the Gulf Oil Corporation formed the Gulf Pension Plan to administer three pension plans that had been in effect at the company for many years. The largest of those plans—the Annuities and Benefits Plan ("A&B Plan")—was a defined benefit plan funded entirely through contributions made by Gulf. Two smaller defined benefit plans—the Contributory Retirement Plan ("CRP") and the Supplemental Annuity Plan ("SAP")—contained employer and employee contributions. The issues raised by the petition relate solely to the allocation of what petitioners characterize as the "surplus assets" of the A&B Plan, and thus solely to funds contributed by Gulf to finance the defined

pension benefits of its employees. The parties settled all claims related to the CRP and SAP plans before this case went to the court of appeals. There is also no issue as to whether petitioners will receive all of the defined pension benefits under the A&B Plan; those benefits are fully guaranteed and secured. Pet. App. A-2 to A-6.

In March 1984, Chevron and Gulf agreed to merge. The companies operated separately under a standstill agreement with the Federal Trade Commission until 1985, when the merger was approved and completed. In July 1986, the Gulf Pension Plan and the Chevron Corporation Annuity Plan were combined to create the Chevron Plan. Section 18.d of the Chevron Plan provided that the employer would be entitled to any residual assets left over after all of the benefits under the Plan had been paid to participants and their beneficiaries. Pet. App. A-4.

2. Petitioners filed this suit in November 1986, claiming, *inter alia*, that a partial termination of the Gulf Plan had occurred as a result of reductions in the workforce. They further contended that, as a consequence, participants were entitled not only to a guarantee of their pension benefits (which Chevron agreed to confer), but also to a *pro rata* share of the "surplus" assets of the Gulf Plan. Pet. App. A-4 to A-6, A-8. The district court granted Chevron's motion to strike petitioners' demand for a jury trial. *Id.* at A-184. The court subsequently found that a partial termination had occurred but—after conducting an exhaustive review of plan documents prepared over the course of more than 40 years—held that petitioners were not entitled to any distribution of plan assets and that those assets could eventually revert to the employer in the event that the plan was completely terminated and all of the benefits

due to the participants were satisfied. *Id.* at A-51 to A-114, A-6 to A-8.

3. The court of appeals affirmed, rejecting petitioners' claim that they were entitled to a distribution of surplus assets upon partial termination.[2] The court explained that section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1), plainly permits reversion to the employer of residual assets attributable to employer contributions following termination of the plan and satisfaction of all liabilities to participants and their beneficiaries. The language of the A&B Plan—which states that "*[a]ll of the assets* held in trust, after provision for any properly chargeable expenses, *shall be used solely for the [participants] until all liabilities under the Plan shall have been satisfied in full*" (Pet. App. A-17 (emphasis added))—also permits a reversion to the employer after the satisfaction of all liabilities. References in the Plan documents to the "irrevocability" of the trust merely paraphrased the requirements of the 1939 Internal Revenue Code and did not preclude a reversion of surplus assets after the trust purpose had been fulfilled. Because the Tax Code and ERISA require that plan assets be used for the "exclusive benefit" of participants *and* permit reversion to employers after liabilities have been satisfied, the repetition of "exclusive benefit" language in the Plan documents cannot be read to preclude a reversion. Pet. App. A-10 to A-31.

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[2] Because the court of appeals held that petitioners were not entitled to a distribution of surplus assets upon partial termination, it declined to consider whether or not a partial termination had taken place. Pet. App. A-9 to A-10 & n.11.

In a footnote (Pet. App. A-30 n.25), the court of appeals rejected the argument that language in the summary plan descriptions ("SPD") of the A&B Plan prohibited any reversion to the employer. The court recognized that under its decision in *Hansen* v. *Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991), the language of the SPD governs if there is a conflict between the SPD and the Plan terms, but there was no conflict among the Plan documents in this case that would call that rule into play:

> We do not consider the language of the A&B Plan to be ambiguous, *nor do we find any conflict between its terms and those of the summary plan descriptions*. Indeed, the summary descriptions of the A&B Plan, in the portions concerning changes to the plan, track the language of the Plan itself * * *.

Pet. App. A-30 n.25 (emphasis added).

The court of appeals also rejected petitioners' claim that they were entitled to a jury trial. The court observed (Pet. App. A-35 n. 29) that "no issues of fact remain to be decided by a jury," making the jury demand an irrelevance in this proceeding. In addition, the court of appeals explained that the claim had no legal basis. The court applied the analysis called for by *Teamsters* v. *Terry*, 494 U.S. 558, 565 (1990), examined this Court's ruling in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), and held that no jury trial was required because the nature of petitioners' cause of action was closely analogous to an equitable proceeding under the law of trusts and because the remedy petitioners sought—distribution of trust assets—was analogous to equitable restitution. Pet. App. A-33 to A-35.

REASONS FOR DENYING THE PETITION

Petitioners' argument that actions under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), should be tried to a jury has no relevance in a case such as this one which turns exclusively on legal issues, and was, in any event, properly rejected by the district court and the court of appeals. By repetitiously citing a few obsolete district court decisions, petitioners attempt to portray the federal courts as divided on the issue, but petitioners pointedly ignore the uniform line of court of appeals authority (including decisions in six circuits since *Firestone*) rejecting their jury trial argument. Petitioners' other two arguments are fact-bound in nature, resting entirely on the particular language of the pension plans and related plan documents, and were correctly resolved by the district court and the court of appeals. There was no dissent from the panel ruling below and no vote in favor of panel rehearing or rehearing en banc. Review by this Court is unwarranted.

I. The Courts Of Appeals Unanimously Have Held That There Is No Right To A Jury Trial For Claims Under ERISA Section 502(a)(1)(B)

Petitioners' argument that they are entitled to a jury trial on their "surplus" claims is meritless because, as we explain below, every court of appeals to consider the issue has concluded that there is no right to a jury trial in these circumstances, and this Court's opinions directly support those recent rulings. We note at the outset, however, that the jury trial issue is not properly raised here, because, as the court of appeals explained (Pet. App. A-35 n.29), by the time it decided this case most issues had been settled and "no issues of fact remain to be decided by a jury." The district court likewise found

specifically (*id.* at A-134 n.55) that questions surrounding petitioners' claim to surplus assets "are all questions of law." Thus, any conceivable error in denying petitioners' jury demand was harmless, and could not be the basis for a new trial or other relief. *Deringer* v. *Columbia Transp. Div.*, 866 F.2d 859, 864 (6th Cir. 1989) (any error in the district court's denial of a jury trial was harmless when the determinative issue was properly decided by the court); *Bowles* v. *U.S. Army Corps of Engineers*, 841 F.2d 112, 117 (5th Cir.), cert. denied, 488 U.S. 803 (1988); *Laskaris* v. *Thornburgh*, 733 F.2d 260, 264 (3d Cir.), cert. denied, 469 U.S. 886 (1984).

Beyond this, petitioners' argument that they were entitled to a jury trial is utterly baseless. Petitioners assert that this Court's passing reference to contract law in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 112 (1989), "changed the law" and nullified *sub silentio* a long line of court of appeals' authority holding that claimants under ERISA section 502(a)(1)(B) are not entitled to jury trials. Pet. 10-11 & n.3. To support this argument, petitioners cite a handful of district court decisions that have allowed jury trials in section 502(a)(1)(B) cases in highly dissimilar circumstances. Pet. 14.

What petitioners fail to inform the Court, however, is that in addition to the uniform line of court of appeals' authority predating *Firestone*, six circuits have considered the issue *subsequent to Firestone*, and each has held that plaintiffs are *not* entitled to jury trials. *Houghton* v. *Sipco, Inc.*, 38 F.3d 953, 957 (8th Cir. 1994); *Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994) (this case); *Garrett* v. *Merchant's, Inc.*, 27 F.3d 563, 1994 U.S. App. LEXIS 14962 (4th Cir. 1994) (unpublished

opinion); *Kirk* v. *Provident Life & Accident Ins. Co.*, 942 F.2d 504, 506 (8th Cir. 1991); *Blake* v. *Union-mutual Stock Life Ins. Co.*, 906 F.2d 1525, 1525-1527 (11th Cir. 1990); *Bair* v. *General Motors Corp.*, 895 F.2d 1094, 1096-1097 (6th Cir. 1990); *Cox* v. *Keystone Carbon Co.*, 894 F.2d 647, 649-650 (3d Cir.), cert. denied, 498 U.S. 811 (1990); *Pane* v. *RCA Corp.*, 868 F.2d 631 (3d Cir. 1989). See generally *Spinelli* v. *Gaughan*, 12 F.3d 853, 855-858 (9th Cir. 1993) (in a case under ERISA section 510, the court of appeals held that "jury trials are generally unavailable under ERISA").[3]

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[3] *Spinelli* is not directly on point because it arose under ERISA section 510, 29 U.S.C. § 1140, not under section 502(a)(1)(B). Three of the ten district court decisions cited by petitioners are also section 510 cases and are thus also not analogous to this case. *McDonald* v. *Artcraft Electric Supply Co.*, 774 F. Supp. 29, 35-36 (D.D.C. 1991); *Vicinanzo* v. *Brunschwig & Fils, Inc.*, 739 F. Supp. 882, 882-883 (S.D.N.Y. 1990); *International Union, UAW* v. *Midland Steel Prods. Co.*, 771 F. Supp. 860, 862-863 (N.D. Ohio 1991).

None of the other district court cases cited by petitioners involved a claim for disgorgement of surplus pension plan assets or anything of a similarly equitable nature. *Sullivan* v. *LTV Aerospace & Defense Co.*, 850 F. Supp. 202, 203 (W.D.N.Y. 1994) (action to collect unpaid severance benefits); *Padilla de Higgenbotham* v. *Worth Publishers, Inc.*, 820 F. Supp. 48, 49 (D.P.R. 1993) (suit claiming negligence and intentional misconduct resulting in denial of disability benefits); *Steeples* v. *Time Ins. Co.*, 139 F.R.D. 688 (N.D. Okla. 1991) (action to obtain medical benefits); *Brasher* v. *Prudential Ins. Co.*, 771 F. Supp. 280 (W.D. Ark. 1991) (suit to recover death benefits); *Resnick* v.

(continued...)

Four of the ten district court cases cited by petitioners are from the Sixth, Eighth and Eleventh Circuits; those courts of appeals have all rejected jury trial demands in similar ERISA cases after *Firestone*. The Third, Fourth and Fifth Circuits have also rejected jury trial claims since *Firestone*, and no court of appeals to consider the issue has reached a contrary result. When this unanimous court of appeals authority is considered along with the equally uniform authority prior to *Firestone*, petitioners' assertion (Pet. 15) that "the Fifth Circuit is out of step with the growing weight of decisional law in this area" rings hollow indeed.

We disagree with petitioners' premise that the *Firestone* decision, which did not decide or even discuss whether ERISA plaintiffs are entitled to jury trials, somehow "changed the law" regarding jury trials. To the contrary, at the core of the *Firestone* decision is the recognition that "ERISA abounds with the language and

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[3](...continued)
Resnick, 763 F. Supp. 760, 763 (S.D.N.Y. 1991) (action to recover vested accrued pension benefits); *Rhodes* v. *Piggly Wiggly Alabama Distributing Co.*, 741 F. Supp. 1542 (N.D. Ala. 1990) (suit to obtain health benefits); *Gangitano* v. *NN Investors Life Ins. Co.*, 733 F. Supp. 342 (S.D. Fla. 1990) (action to recover medical insurance benefits).

Although we question the correctness of these decisions, even if a jury trial were required in an ordinary denial of benefits case it would not follow that a jury trial would also be required in a case seeking the dismantlement of a $650 million trust and the equitable distribution of trust assets to participants who have already been guaranteed all of the benefits they were promised. Claims of this kind are exclusively equitable in character. See page 11 n.4, *infra*.

terminology of trust law" (489 U.S. at 110) and that principles of trust law should be applied in developing federal law under ERISA. See also *Curtiss-Wright Corp.* v. *Schoonejongen*, No. 93-1935, slip op. at 11 (U.S. Mar. 6, 1995) (ERISA "follows standard trust law principles"); *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 568-569 (1985) (ERISA's duties "are based" on the "law of trusts"). As the court of appeals held in this case (Pet. App. A-34), "the law of trusts [is] an area within the exclusive jurisdiction of the courts of equity," and trust cases are typically tried to the court. Petitioners argue (Pet. 10) that their claim for surplus assets must be regarded as a legal claim because they seek a monetary recovery, but as the court of appeals held, monetary relief of the type sought by petitioners "sounds in equity, and thus does not guarantee a jury trial, when it is restitutionary in nature or is intertwined with claims for injunctive relief." Pet. App. A-35, citing *Teamsters* v. *Terry*, 494 U.S. at 570-571. See also *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2068-2069 (1993).[4]

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[4] Petitioners' complaint made absolutely clear the equitable nature of the relief sought. Petitioners requested rescission of the Chevron-Gulf Plan merger, "disgorge[ment]" of transferred Plan assets, and "reformation" of Plan documents. Prayer for Relief ¶¶ (k), (g) and (m). All of those remedies are equitable. *E.g.*, *Teamsters* v. *Terry*, 494 U.S. at 570 (disgorgement); *Enserch Corp.* v. *Shand Morahan & Co.*, 952 F.2d 1485, 1502 (5th Cir. 1992) (reformation); W. DeFuniak, *Handbook of Modern Equity* 231-235 (2d ed. 1956) (rescission and reformation). Moreover, it is inconceivable that surplus Gulf Plan assets could be allocated without an accounting, another distinctively equitable

(continued...)

II. There Was No Conflict Between The Summary Plan Descriptions And The Terms Of The A&B Plan

Petitioners' second claim (Pet. 15-19) is that the court of appeals' holding that reversion of surplus assets was not prohibited by language of the summary plan descriptions conflicts with a prior decision of the Fifth Circuit and decisions in other circuits holding that in the event of a conflict between the language of the SPD and the terms of the plan, the SPD prevails.[5] Petitioners assert that there is a conflict between the language of the summary plan descriptions and the terms of the A&B Plan regarding the reversion of surplus assets; that the court of appeals held that the language of the SPDs is relevant only if the pension plan is ambiguous; and that in so holding the court below disregarded its previous

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[4](...continued)
remedy. See Prayer for Relief ¶ (o) (demanding "an actuarial evaluation" of the Gulf Plan); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 44-47 (1989).

[5] The petition falsely implies that Chevron has taken a reversion of the surplus assets of the A&B Plan: "Petitioners and Chevron fought at trial and on appeal over who is entitled under the Plan to the approximately $650 million in surplus assets from the A&B Plan *that Chevron reverted to itself.*" Pet. 15 (emphasis added). To the contrary, Chevron has not taken any reversion of A&B Plan assets, and, as the court of appeals and the district court both recognized (Pet. App. A-14, A-132), under ERISA, the Internal Revenue Code, and the terms of the Chevron Plan, no reversion is possible prior to the complete termination of the Plan and the satisfaction of all liabilities to participants and their beneficiaries.

decision in *Hansen* v. *Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991), and created a conflict with other circuits.[6] This claim is based entirely on a misstatement of the court of appeals' decision. See Pet. App. A-30 n.25.

Petitioners neglect to mention that the court of appeals, in the remainder of the footnote they partially describe (Pet. 17), *expressly held that there was no conflict* between the SPDs and the terms of the Plan:

> We do not consider the language of the A&B Plan to be ambiguous, *nor do we find any conflict between its terms and those of the summary plan descriptions*. Indeed, the summary descriptions of the A&B Plan, in the portions concerning changes to the plan, track the language of the Plan itself * * *.

Pet. App. A-30 n.25 (emphasis added). There is no reason why this Court should reconsider that factual issue, which was decided the same way by both the district court (Pet. App. A-112 to A-113) and the unanimous court of appeals. See *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) (the Court does not grant certiorari "for correction of errors in fact finding," especially where there are "concurrent findings of fact by two courts below"); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

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[6] Two of the three judges on the panel in this case—Chief Judge Politz and Judge Garwood—were also on the panel that decided *Hansen*, the case petitioners claim they have now ignored.

Moreover, the decision of the courts below that there is no conflict between the Plan and SPDs is plainly correct. Petitioners' claim of "conflict" is based on the recitation in the SPDs of the "exclusive benefit rule" language of ERISA section 403(c)(1), 29 U.S.C. § 1103(c)(1)—language that is found in both the Plan and the SPDs. As the court of appeals (Pet. App. A-24 to A-26) and the district court (*id.* at A-106 to A-109) held, because ERISA requires plans to abide by the exclusive benefit rule and at the same time expressly permits the residual assets of a defined benefit plan to revert to the employer after all liabilities have been satisfied (ERISA section 4044(d)(1), 29 U.S.C. § 1344(d)(1)), recitation of the "exclusive benefit" language in an SPD cannot be read to preclude reversion.

When the holding of the court of appeals that there is no inconsistency between the terms of the Plan and the SPDs is taken into consideration, any semblance of a conflict among the circuits vanishes. The Fifth Circuit in this case and in *Hansen* expressly agreed with other courts which have held that, in the event of a conflict between SPD language and plan language, the SPD language governs. But that rule is not triggered where, as here, there is no conflict. As Judge Posner explained in one of the decisions petitioners cite:

> [An ERISA plan participant] is protected by the fact that, in the event of a discrepancy between the coverage promised in the summary plan document and that actually provided in the policy, he is entitled to claim the former. * * * *But only if there is a contradiction between the summary plan document and the policy. There is*

> *not in a case such as this where the policy clarifies rather than contradicts the summary.*

Senkier v. *Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991) (emphasis added).

In sum, the court of appeals correctly held that there was no conflict between the SPD language and the terms of the A&B Plan: the court's observation that the terms of the A&B Plan were not "ambiguous" thus has no independent significance.[7] In the absence of a conflict between the SPD and plan terms, all of the courts of appeals cited by petitioners would have reached the same conclusion as the Fifth Circuit and the district court: that neither the SPDs nor the terms of the A&B Plan prohibited a reversion to the employer.

III. Nothing In The A&B Plan Or In ERISA Requires Distribution Of Surplus Assets Upon A Partial Termination Of The Plan

Petitioners' final claim is that the court of appeals "misapplied ERISA law" (Pet. 19) in deciding that petitioners were not entitled to a *pro rata* share of "surplus" assets upon partial termination of the A&B Plan.[8] This claim, again rejected by both the district

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[7] As explained on pages 5-6, *supra*, and in the opinion of the court of appeals (Pet. App. A-16 to A-31), there was no ambiguity in the Plan or SPDs.

[8] The petition incorrectly suggests that as a result of its finding that there had been a partial termination of the Plan, the district court held that "Petitioners are therefore entitled to a *pro rata* share of the surplus assets in the Plan," and that "[t]he Fifth Circuit disagreed" with the district court on

(continued...)

court (Pet. App. A-103 to A-114) and the court of appeals (*id.* at A-10 to A-31), is based entirely on the language of the various plan documents and does not present any issue of general importance that might possibly warrant Supreme Court review.

In concluding that petitioners were not entitled to any share of "surplus" assets upon partial termination, the court of appeals recognized (Pet. App. A-14 to A-15, A-30 to A-31) that the concept of a "surplus" prior to the complete and final termination of a plan is meaningless as a matter of statutory construction (because the existence and amount of a surplus cannot be determined until after all liabilities have been satisfied), and, if accepted by the courts, would seriously undermine statutory policy. The "actuarial surplus" of an ongoing plan is a highly artificial concept based on any number of assumptions about the participants (when will they retire, how long will they live) and about the plan assets (particularly about the anticipated earnings on those assets). Any distribution of "surplus" assets before final plan termination would deprive the employer and other employees of the safety cushion built up through employer contributions and diminish the security of the benefits of the remaining participants. See Jereski, "The Surplus Vanishes," *Forbes*, Nov. 17, 1986, at 94; Much, "Pension Liabilities: Now You See 'Em, Now You Don't!," *Industry Week*, Nov. 16, 1981, at 72.

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[8](...continued)
that point. Pet. 19. Both the district court (Pet. App. A-103 to A-114) and the court of appeals (*id.* at A-10 to A-31) held that petitioners were *not* entitled to surplus assets.

Petitioners have not pointed to a single federal court decision requiring distribution of surplus assets upon partial termination, and to our knowledge no federal court has ever reached that result. The asserted conflict with the Seventh Circuit's decision in *Albedyll* v. *Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991), is imaginary. As the Fifth Circuit pointed out (Pet. App. A-19), *Albedyll* dealt with a complete and final plan termination, not a partial termination. In addition, the language of the pension plan involved in *Albedyll*, as well as an early outline of the plan, expressly provided that surplus assets would be distributed to the participants. *Ibid.*

On the other hand, federal courts consistently have held that plan participants have no claim to surplus assets at partial termination. See, *e.g.*, *Chait* v. *Bernstein*, 835 F.2d 1017, 1021 (3d Cir. 1987) (the partial termination vesting rule "should not be extended to apply to surplus assets"); *Walsh* v. *Great Atl. & Pac. Tea Co.*, 96 F.R.D. 632, 652 (D.N.J.) ("a right to excess assets is not a benefit which can accrue to an individual participant during the life of the plan"), aff'd, 726 F.2d 956 (3d Cir. 1983); *Van Orman* v. *American Ins. Co.*, 608 F. Supp. 13, 25 (D.N.J. 1984); *Morales* v. *Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1303-1304 (E.D. La. 1989) ("[e]ven if the facts supported finding a partial termination, plaintiffs would not be entitled to the alleged 'surplus benefits'"), aff'd, 914 F.2d 83 (5th Cir. 1990). See also *Mead Corp.* v. *Tilley*, 490 U.S. 714, 718 (1989) ("[i]f funds remain after 'all liabilities of the plan to participants and their beneficiaries have been satisfied,' they may be recouped by the employer").

The language of the A&B Plan clearly envisioned that upon *final* termination, and "satisfaction of all liabilities under the Plan" (Pet. App A-17), surplus assets contributed by the employer would revert to the employer. Nothing in that language even remotely suggests that upon *partial* termination surplus assets should be distributed to a subset of participants, and nothing in ERISA or federal pension policy could support such a windfall.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[9] As the district court explained (Pet. App. A-113 to A-114):

> This construction of the Gulf Plan is consistent with the policies underlying ERISA. It guarantees that the plaintiffs will receive all benefits accrued under the A&B Plan and the Gulf Plan. However, it also allows the employer, which made all of the plan contributions, to recover any remaining surplus after all plan liabilities have been satisfied. A contrary construction could deter employers from fully funding plans, or from erring on the side of plan members in making funding projections, out of fear that the penalty for making a mistake in funding calculations would be to forego an eventual right to receive any surplus upon termination of the plan. This consideration should not be understated. Underfunded pension plans can seriously prejudice members' rights to receive benefits provided to them by the plan and, even when those benefits are insured, can require the Pension Benefit Guaranty Corporation, and ultimately the taxpayers, to assume responsibility for them.

Respectfully submitted.

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